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In The
# Supreme Court of the United States

FAIRFAX REALTY, INC., formerly PRICE DEVELOPMENT COMPANY, NORTH PLAINS LAND COMPANY, LTD., AND NORTH PLAINS DEVELOPMENT COMPANY, LTD.,

*Petitioners,*

v.

ARMAND L. SMITH AND VIRGINIA L. SMITH,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Utah Supreme Court**

## RESPONDENTS' BRIEF IN OPPOSITION

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February 24, 2004

## QUESTIONS PRESENTED

1. Did Petitioner fail to raise and brief a federal constitutional punitive damage excessiveness issue before the Supreme Court of Utah contrary to the requirements of Utah Appellate law and the precedent of this Court?

2. Even if Petitioner had raised and briefed a federal constitutional due process issue before the Supreme Court of Utah (which it plainly did not), should this Court grant certiorari to review another Utah Supreme Court decision which held, under a state *de novo* standard of review, that a $5.5 million punitive damage award, with $1 million in compensatory damages (a ratio of 5.5:1), was not excessive under Utah law given Petitioner's fraudulent, deceitful and reckless breaches of fiduciary duty and conversion of partnership assets, which directly harmed Respondents and occurred entirely in Utah?

## PARTIES TO THE PROCEEDINGS

Petitioner, Fairfax Realty, Inc.,[1] formerly Price Development Company, a Utah corporation, is owned 99.99% by John Price, its Chairman and CEO and .01% by his wife, Marsha Price, both of Salt Lake City. Tr. 567, 2164. Price Development Company was the general partner of the North Plains Development Company, Ltd. and North Plains Land Company, Ltd., the partnerships which owned and operated the partnership property, the North Plains Mall.[2] Ex. P-15 at Art. 4; Ex. P-16 at Art. 4.

The Respondent, Armand L. Smith, is a citizen of Clovis, New Mexico. The Respondent, Virginia L. Smith, formerly of Clovis, is now a citizen of Austin, Texas.

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[1] The use of the name Fairfax Realty to describe the Petitioner herein obfuscates the real parties, the witnesses and the entire record below. The operative facts took place when Petitioner was Price Development Company, a Utah corporation. The name change occurred after the JP Realty REIT was formed. But, the name "Price" or "Price Development," not Fairfax Realty, is used throughout the testimony and evidence by the trial court and by the Utah Supreme Court to refer to Petitioner. Thus, Petitioner will be referred to as "Petitioner" or "Price."

[2] The Utah compensatory and punitive damage judgment, as affirmed in substantial part by the Supreme Court of Utah, was against *only* Fairfax Realty, Inc., formerly Price Development Company. As such, *only* Price Development is entitled to seek relief by way of the certiorari Petition. It necessarily follows that North Plains Land Company, Ltd. and North Plains Development Company, Ltd., do not have standing and are not proper petitioners in the certiorari Petition. *Penfield Co. v. SEC*, 330 U.S. 585, 589 (1947) (writ dismissed as to petitioner where no judgment was rendered against it below and no relief was sought by or against it on certiorari). Accordingly, references herein to Petitioner mean Price.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDINGS | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE | 1 |
| STATEMENT OF THE CASE AND FACTS | 1 |
| FACTS | 4 |
| REASONS WHY THE CERTIORARI PETITION SHOULD BE DENIED | 16 |
| I. Petitioner Failed to Raise a Federal Constitutional Question Before the Supreme Court of Utah as to Excessiveness of the Utah Punitive Damage Judgment and Now Attempts to Raise That Question Before This Court For the First Time | 16 |
| II. Even if Price Had Raised and Briefed a Federal Issue Below (Which It Plainly Did Not), The Petition Should be Denied Because the Utah Supreme Court, Like This Court, Has Not Established a Bright-Line Formula to Review a State Punitive Damage Judgment | 22 |

TABLE OF CONTENTS – Continued

Page

III. Even if Price Had Raised and Briefed a Federal Constitutional Issue Below (Which It Clearly Did Not), the Petition Should Be Denied Because the Utah Supreme Court Conducted a Full De Novo Review of the Punitive Damage Judgment Under Utah Law ..... 26

CONCLUSION ..... 29

## TABLE OF AUTHORITIES

Page

CASES

*Adams v. Robertson*, 520 U.S. 83 (1997) ..... 17, 21

*Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988) ..... 20

*BMW v. Gore*, 517 U.S. 559 (1996) ..... 18, 20, 22, 24, 25

*Carrier v. Pro-Tech Restoration*, 944 P.2d 346 (Utah 1997) ..... 19

*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) ..... 25, 28

*Crookston v. Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991) ..... *passim*

*Eddings v. Oklahoma*, 455 U.S. 104 (1982) ..... 21

*Gompers v. U.S.*, 233 U.S. 604 (1914) ..... 23

*MacKay v. Hardy*, 973 P.2d 941 (Utah 1998) ..... 18, 19

*Mahmood v. Ross*, 990 P.2d 933 (Utah 1999) ..... 28

*Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000) ..... 21

*New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928) ..... 21

*Norton v. Matthews*, 427 U.S. 524 (1976) ..... 28

*Shattuck-Owen v. Snowbird Corp.*, 16 P.3d 555 (Utah 2000) ..... 19

*Smith v. Four Corners Mental Health Center, Inc.*, 70 P.3d 904 (Utah 2003) ..... 19

*State v. Bishop*, 753 P.2d 439 (Utah 1988) ..... 19

*State v. Gomez*, 63 P.3d 72 (Utah 2002) ..... 19

*State v. Jaeger*, 973 P.2d 404 (Utah 1999) ..... 19

TABLE OF AUTHORITIES – Continued

Page

*State v. Thomas*, 961 P.2d 299 (Utah 1998) ..... 19

*State Farm Auto Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) ..... *passim*

*Taylor v. Illinois*, 484 U.S. 400 (1988) ..... 21

*Trinity Evangelical Lutheran Church Sch. v. Tower Ins. Co.*, 661 N.W.2d 789 (Wis. 2003) ..... 25

*Webb v. Webb*, 451 U.S. 493 (1981) ..... 20

*Wolfe v. North Carolina*, 364 U.S. 177 (1960) ..... 17

CONSTITUTION, STATUTES, RULES AND REGULATIONS

U.S. CONST., Amendment XIV ..... 1, 16

28 U.S.C. § 1257(a) ..... 1, 22

U.S. Supreme Court Rule 14.1(g)(i) ..... 21, 22

U.S. Supreme Court Rule 15.2 ..... 4

Utah Rule Appellate Procedure 24(a)(5) ..... 17, 18

Utah Rule Appellate Procedure 24(a)(6) ..... 17

Utah Rule Appellate Procedure 24(a)(9) ..... 18

## JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257(a). The Utah Supreme Court held that Price failed to raise and brief a federal constitutional issue under Utah Appellate law, and therefore declined to address a federal issue. Price claims it raised a federal issue below by citing a federal case in a footnote at the end of an unrelated 10-page state law argument at page 45 of a 50-page brief. Pet. 2. Such footnote is plainly insufficient to raise a federal question. The Petition's jurisdictional defect is discussed at greater length *infra*.

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Contrary to Price's Statement (Pet. 3), the Fourteenth Amendment to the United States Constitution was not raised and briefed below, the Supreme Court of Utah declined to and did not decide the case on the Federal Constitution and, thus, it is not before this Court.

## STATEMENT OF THE CASE AND FACTS

This is a fact-bound case in which Price, a Utah general partner and fiduciary of the two North Plains Mall Partnerships, deceived and defrauded the Smiths, two relatively small limited partners, by secretly contributing in September 1993 and conveying in January 1994 the entire partnership assets and interests to itself to form the JP Realty

REIT,[3] without notice and in breach of the Smiths' express consent provisions of the partnerships. Price "cooked" the partnership books in March 1994 in offering the Smiths *only **$6,160** for their entire 15% interest in the regional Mall*, and failed completely to make any accounting as to the fair market value of the Smiths' partnership interests. Price then continued the deceit and fraud through 5½ years of litigation until it casually disclosed during discovery in January 2000 its so-called "REIT value" calculation of the Smiths' partnership interests to be over $54,000, a value which Price's investment bankers had calculated in January 1994 but never disclosed to the Smiths. The jury found that the *fair market value*, vis-a-vis the invented "REIT value,"[4] of Smiths' partnership interests was over $1 million.

It is noteworthy that Price *did not appeal* to the Supreme Court of Utah the unanimous jury verdict and District Court judgment findings of breaches of fiduciary duty, intentional conversion of partnership assets, and breaches of contract, contending rather, that the Smiths suffered no compensable injuries from such breaches and conversion.[5] However, to read Price's Petition, the perception is that Price Development and its owner and CEO, John Price, were paragons of virtue as to Price's treatment of the Smiths. Not a single sentence of its Petition

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[3] The "JP" in the JP Realty REIT stands for "John Price."

[4] The District Court held prior to the trial, that in evaluating damages for the loss of Smiths' real estate partnership interests, the test was "fair market value" and not Price's self-invented "REIT value." Price never appealed the ruling.

[5] In fact, Price in December 2003, paid the compensatory damage elements of the state District Court judgment, as affirmed by the Utah Supreme Court. Resp. App. 5-8.

acknowledges the breaches of fiduciary duty and willful conversion of partnership assets, instead contending that Price's conduct was noble in all regards. It was just such arrogant and self-righteous conduct that translated into a willful, wanton and reckless disregard of the partnership interests of Armand and Virginia Smith, compelling a substantial award of punitive damages.

The Smiths' June 1994 complaint against Price went to trial by jury before the District Judge on March 26, 2001. A unanimous jury returned its verdict on April 12, 2001 concluding that Price breached its fiduciary duties to Smiths, intentionally converted partnership assets to its own purposes and breached the partnership agreements resulting in compensatory damages of $1.1 million.

The jury also determined, under unappealed Instructions, that Price's breaches of conversion were willful, malicious, and/or in reckless or wanton disregard of Smiths' rights and warranted punitive damages. Pursuant to Utah's bifurcation statute, the trial court then heard further evidence and argument and after further unappealed Instructions, a unanimous jury returned a $5.5 million punitive damage verdict. The District Judge, pursuant to Utah jurisprudence of *Crookston v. Fire Ins. Exchange*, 817 P.2d 789 (Utah 1991), articulated five pages of specific findings supporting the punitive damage award. The District Court also awarded Smiths attorneys' fees of approximately $517,000, not for the reasons suggested by Price,[6] but because fees were provided for in the Partnership Agreements. Exs. P-15, P-16 at Art. 19, Resp. App. 9.

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[6] Price wrongly suggests that the attorneys' fees were discretionarily awarded and had both a punitive and compensatory aspect. Pet. (I) 12, 15,

(Continued on following page)

The District Court denied Price's motions for a directed verdict and new trial from which an appeal to the Supreme Court of Utah was taken. In that appeal, Price did not raise a federal constitutional punitive damages excessiveness issue. Pet. App. 1a-2a, 15a.

## FACTS

Price's Facts contain material misstatements and omissions, so as to unapprise the Court as to what the issues and evidence were at trial.[7]

1. ***The Parties and the North Plains Mall Partnerships.*** Price was one of the largest owner-operators of commercial shopping malls and retail properties in 7 states in the intermountain west. Ex. P-71. Its Chairman and CEO was John Price of Salt Lake City, Utah, who owned 99.99% and controlled all of the Price stock. Tr. 567, 2164. Respondents, Armand L. Smith ("Smith") and Virginia L. Smith (collectively "Smiths") were residents of Clovis, New Mexico, 200 miles east of Albuquerque.

In November 1984, Smiths entered into two substantially identical Land and Development Partnerships with Price, John Price and other Price executives to own, construct and operate the North Plains Mall (the "Mall") as a regional shopping center in Clovis. Exs. P-15 and P-16. The general partner of both partnerships with a 20%

16 fn.5. Attorneys' fees were clearly awarded to Smiths pursuant to the express provisions of Partnership Agreements and not as part of the judicially awarded compensatory or punitive damages. Resp. App. 9.

[7] Supreme Court Rule 15.2 admonishes counsel of their obligation to point out perceived misstatements in the Petition.

interest was Price controlled by John Price. The Smiths had a 15% limited partnership interest in both entities, Smiths having contributed the land for the Mall at 20% (or more than $500,000) less than its fair market value in return for the partnership interests. Tr. 194-98.

**2.** ***Price's Claim As General Partner.*** Although unmentioned in the Petition, a core issue at trial was whether Price had authority, as general partner, to convey the Mall to the JP Realty REIT without Smiths' consent. Both Partnership Agreements required 90% approval of the limited partners before the general partner could assign the partnership property to a non-partnership purpose. Exs. P-15, P-16 at Art. 7.1, 7.6. The 90% requirement was for the protection of the Smiths. Tr. 211-15. Price claimed that a conveyance of the Mall to a REIT was a partnership purpose and was authorized by the partnership agreements. Smiths' evidence was that Price's conveyance of the Mall to a REIT was a non-partnership purpose that required their 15% approval, and that any such conveyance without Smiths' approval would constitute a breach of fiduciary duty, a conversion of partnership assets and breach of the partnership agreements.

John Price, himself, settled the issue by *admitting* on cross examination that a conveyance of the Mall by Price to the REIT was not a partnership purpose. Tr. 578. The jury necessarily found that the REIT contribution and conveyance was not a "partnership purpose." Price did not appeal that issue.

**3.** ***The Mall Was Never In Financial Trouble.*** The Mall opened with forty tenants, including major anchors, JC Penney's, Wal-Mart, Zales and Bealles stores. Tr. 220. Later, Sears became another anchor tenant. Tr. 205. The Mall's typical occupancy rate was 93%, a good

rate for malls. Tr. 562-63. From 1986 to 1993 Price consistently informed the Smiths that it was pleased with the Mall's performance, and Price never once indicated that the Mall was headed toward financial trouble. Tr. 222-23, 251-55. In fact, the Mall's net operating income increased from $1,028,000 in 1990 to $1,242,000 in 1994. Tr. 374-83; Ex. P-141.

Contrary to Price's invented after-the-fact "financial trouble" argument (Pet. 6-7), in September 1991 Price's Mendenhall represented to Chemical Bank, the Mall's lender, the real strength of the Mall:

> I'm sure, as you have watched the progress of North Plains over the last year, you are as pleased as we are to see the project at over 95% occupancy. The market remains strong. The mall continues to dominant [sic] the retail market. Ex. P-146.

Moreover, contrary to Price's implication that the "capital call" made in December 1989 was to cover an operating "shortfall" (Pet. 6), the capital call was in fact to cover new capital construction of the theater and Sears building. Tr. 240, Ex. P-34. In a further fiduciary breach, Price consistently accrued compound interest to John Price and itself on their portions of the capital call, but not on the Smiths' interests. Tr. 247-48, 1771-72.

The Chemical Bank loan originally matured in October 1999, but was routinely rolled with a further extension "assumed" by Price to at least July 1994, if necessary. Tr. 1065-66, 1177-78. Price twice hired the same banker, A. Oliver, in 1988 to find long-term financing for several Price and John Price Malls simultaneously, and again in 1991. Tr. 1590, 1599, 1619. Oliver was not retained to find a potential buyer and did not even list the Mall for sale with real estate brokerages. Tr. 1615, 1619, 1620.

There was *no evidence* at trial that prior to the creation of the JP Realty REIT, the Mall was designated a "distressed" or "financially troubled" property. That testimony all came 7-9 years later in 2001 when Price was trying to rationalize and whitewash the conveyance of the Mall to itself, the REIT, without even attempting to obtain the Smiths' contractually required consent. Tr. 1719, 1784-85. In point of fact, the Mall had its most profitable year ever in 1993. Tr. 269.

**4. *Price's Real Reason for the REIT and the Secret Mall Conveyance.*** Contrary to Price's after-the-fact invention that it conveyed the Mall to its JP Realty REIT to avoid the Mall's insolvency (Pet. 6-7, Tr. 617, 1089), the REIT was *formed to confer extraordinary monetary benefits on John Price including the elimination of over $94.4 million of personally guaranteed debt on Price properties* in 7 states, much of which was due in 1994. Tr. 902-06; Ex. P-71 p. 8. Price openly told the investing public that the JP Realty REIT was:

> formed *to continue and expand the business* . . . of certain affiliated companies . . . owned and controlled by John Price, Chairman of the Board and Chief Executive Officer of the Company [JP Realty, Inc.]. Ex. P-71 p. 1 (emphasis added).

Contrary to Price's claim now made that the Mall could have been easily left out of the JP Realty REIT, the REIT's Prospectus listed the Mall as one of eight major, "premier and dominant" regional malls of Price which were "the centerpiece" and "a vital part" of the REIT. Tr. 1164, Ex. P-71 p. 3.

Price misstates the evidence that the tax consequences "were not a consideration" for Price conveying the Mall to itself without Smiths' consent. Pet. 8-9. Price's Mendenhall admitted at trial that preservation of tax status was the "*primary reason*" for Price contributing the Mall to the

REIT. Tr. 1923 (emphasis added). John Price personally had a negative partnership capital account of $4.7 million by the end of 1993 as a result of Price allocating ordinary tax losses, including depreciation, to John Price (totaling $1,452,000 in 1992-93 alone) while at the same time allocating $491,450 of "phantom taxable income" to Smiths. Tr. 1561, 1569-1571; Exs. P-70, P-56. This "creative bookkeeping" gave Price such a high negative capital account that a third-party sale in 1994 would have resulted in major adverse tax consequences to John Price.[8] Tr. 1570-71.

5. ***Price's Creation of the REIT in September 1993 and the 3 Phony Options.*** On July 18, 1993, two of Price's top officers, Mendenhall and Fraser, telephoned Smith to obtain a qualification statement regarding a REIT that Price had decided to pursue. Tr. 264, 475, 487. Smith knew nothing about a REIT and was concerned about the REIT's effect on Smiths' Mall partnership interests. Tr. 267. Mendenhall and Fraser then gave Smiths 3 options regarding Smiths' 15% interest in the Mall partnerships:

i. Price would cash out the Smiths;

ii. Price would contribute John Price's and other Price interests in the Mall to the REIT and Smiths would remain 15% partners;

iii. The entire Mall would be contributed to the REIT and Smiths would receive REIT stock. Tr. 270-71; Ex. P-57.

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[8] The jury and District Court also had before it significant evidence of Price's breach of fiduciary duty by its "dumping" monies from all Price properties into a co-mingled account with the Mall and by paying itself substantially inflated general partner management fees. Tr. 225, 1205-07, 1707.

While Mendenhall and Fraser told Smith that they would contact him again as to the options, they did not during all of July-October 1993. Tr. 274. Meanwhile, without Smiths' knowledge, Price formed the JP Realty REIT on September 8, 1993, and without Smiths' consent, Price secretly signed two back-dated "contribution agreements" with itself contributing the Mall to the REIT. Tr. 497-98, 507, 509-14; Exs. P-58 and P-59. Price then filed a September 15, 1993 preliminary S-11 Registration Statement with the U.S. Securities & Exchange Commission ("SEC"), which described all of the REIT properties including the Mall. Tr. 499-501, Ex. P-163. Price hired expensive Wall Street lawyers and investment bankers regarding the S-11 Registration, whose heavy expenses were allocated to the Mall without Smiths' knowledge or consent. Tr. 501-02, 1152-53.

Contrary to Price's erroneous and irrelevant statement that the "Mall was valued according to traditional REIT standards" (Pet. 10), the District Court, in an unappealed ruling, determined that the value of the Smiths' real estate partnership interests in the Mall was to be, in law, based on "fair market value" and not on Price's newly manufactured "REIT value." Tr. 1196-99, 1287-88. "REIT value" was admissible only as an attempt to explain Price's conduct. *Id.* Price's executives *admitted* that as the general partner of the Mall it did not obtain *and did not even want*, a fair market value analysis or appraisal of the Mall before it secretly contributed the Mall to the REIT. Tr. 363, 528, 1150. Price based its concocted "REIT value" on an erroneous "backed-into" capitalization rate. Tr. 363-64, 1165-68.

Price's deceitful failure to disclose the secret contribution of the Mall to its REIT in September 1993 turned into egregious fraud in December 1993. Responding to Smiths'

inquiry regarding the 3 options and the fair market value vis-a-vis "REIT value," Mendenhall wrote on December 2, 1993:

> *To date, we have not found an acceptable buyer willing* to pay a reasonable price for the property or a lender that would loan sufficient funds. . . . These facts are what prompted my conversation with you some time ago as to whether *you might have a group of investors who might be willing to purchase the property*.

Ex. P-65 (emphasis added).

When Mendenhall wrote the letter, *he knew that Price, as a fiduciary, had already secretly contributed the Mall to the JP Realty REIT nearly three months before, yet Mendenhall deceitfully states that no buyer has been found and implies that Smith should be seeking investors.* Tr. 1991-96; Ex. P-65.

**6.** ***Implementation of the JP Realty REIT.*** Price *failed to disclose* to the SEC or potential investors that it had non-consenting partners in the North Plains Mall. Ex. P-71. Smith was never provided a Prospectus until Price finally sent it (the sixth version) to Smith on January 13, 1994. Tr. 298-99. When Smith received the Prospectus, he still was unaware that the Mall had been transferred to the JP Realty REIT.[9] Tr. 300.

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[9] The plain answer to Price's footnote 11, Pet. 28-29, is that Smith was a layman, unadvised by securities lawyers, as to the REIT's effect. Additionally, the 116-page Prospectus did not disclose numerous factors, such as the secret back-dated contribution agreements, the Mall's fair market value, the non-existence of the 3 options, the Mall's so-called "REIT value," or the excessive fees Price paid to itself and co-mingling of accounts. Ex. P-71.

On January 21, 1994, the JP Realty REIT went public selling $198 million in stock at $17.50 per share to the investing public. Tr. 1935; Ex. P-71. Prior to January 21, 1994, Smith contacted Price several times to ask about the 3 options and Smiths' interest if the Mall was transferred to the REIT, but Price gave no answer. Tr. 299-300, 1161-62.

The REIT gave to the fiduciary, Price (owned 99.99% by John Price), and to John Price personally enormous benefits, including *inter alia*:

i. *The elimination of more than $94.4 million of John Price personal guaranties on the contributed properties, including the Mall.* Tr. 903, 906; Ex. P-71 pp. 8, 26;

ii. John Price, personally, wound up with 19.4% of the equity shares in the REIT. Ex. P-71, p. 65;

iii. A personal John Price entity received 200,000 of REIT voting shares entitling John Price to elect two of the seven REIT board. Tr. 907; Ex. P-71 pp. 8, 26;

iv. John Price along with a small number of Price executive officers, received stock options of 475,000 shares of JP Realty REIT. Tr. 907; Ex. P-71 pp. 8, 26;

v. The payment of $45.1 million to John Price's former partners (fiduciary relationship) in the Salt Lake City Cottonwood Mall, so that Price could contribute Cottonwood to the REIT. Tr. 899-900; Ex. P-71 pp. 7-8, 26;

vi. The deferral of income tax on millions of dollars of John Price's holdings. Tr. 902; Ex. P-71, p. 8;

vii. The REIT payment to Price Development of approximately $27.1 million in loans on the various malls and properties which were coming due in 1994. Tr. 904, 989; Ex. P-71 p. 28; and

viii. The release of John Price from maintaining at all times a bank-required $40 million personal net worth. Tr. 906.

Despite the foregoing substantial and material benefits realized by John Price,[10] Price and Price executives, there had been no accounting of the Smiths' 15% interest in the Mall. The Smiths were the only partners in the Mall who were not aware of the contribution to the REIT and of their loss of interest in the Mall property. Tr. 360-61, 513-14; Exs. P-15 and P-16 at Art. 4.

7. ***Why Price Failed to Disclose Its Contribution of the Mall to the REIT.*** Price claims it concealed its contribution of the Mall to the REIT upon advice of counsel, that the securities laws precluded disclosure because Virginia Smith was an "unaccredited investor." Pet. 8-9. Price's trumped-up rationalization of its breach of fiduciary duty was rejected at all levels of the Utah judicial process.

First, there is positively no pre-REIT written evidence of the "advice of counsel" or "unaccredited investor" contention, only the after-REIT oral excuse. Second, both Utah courts found that Price executives were very concerned that if they told the Smiths (or even Armand Smith

[10] Price asserts that John Price's personal stake was diluted by "several million dollars"; however, his interest was simply decreased without regard to Smiths, so the values would equate to what the stock market was willing to pay per share. Pet. 9; Tr. 1113-14.

who *was* an accredited investor) of the secret contribution, the Smiths could potentially make a claim or file an action that would impair the implementation of the JP Realty REIT. Pet. App. 20a, 36a. Third, a fiduciary cannot intentionally breach its fiduciary duty to its principals by conveying partnership assets to itself and then claim it was in a public offering "quiet time" precluding a disclosure. Price's *fundamental, over-arching obligation was that of a fiduciary* with a duty of full disclosure to the Smiths.[11]

8. ***Price "Cooked the Partnership Books."*** In February and March 1994, Smith continued to inquire about the 3 options and Smiths' 15% Mall interest. Tr. 300-08. On March 8, 1994, Mendenhall, with the specific authorization and consent of John Price and two other Price officers, created and faxed to Smith, Price's so-called "revised computation" of Smiths' "REIT value" in the Mall. Tr. 1999; Ex. P-82 pp. 1, 4. Bearing an intentionally false date of January 12, 1994 (Tr. 2004-05), Price's March 8 "revised computation" made the following accounting and proposal to Smiths:

i. The REIT value of Smiths' 15% interest in the Mall was ***$6,160*** (352 units at $17.50 p/unit);

ii. The total REIT value of the Mall was $41,090 (2,348 units at $17.50 p/unit);

iii. Smiths' 1989 "capital call" would be made available without interest. Tr. 343, 347, 349; Ex. P-82 pp. 1, 4.

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[11] Otherwise, bank employee embezzlers or corporate executives could successfully contend that because they were using the embezzled monies or assets in a federal securities offering, they could, upon the advice of counsel, shelter their wrongful conduct from disclosure.

Undisclosed was the fact that three months earlier, in January 1994, Price's investment bankers had calculated the total "REIT value" of the Mall to be based on 20,793 units or $363,877 (not 2,348 units or $41,090), and that Smiths' 15% interest had a "REIT value" of 3,119 units or $54,582 (not 352 units or $6,160). This January 1994 REIT value calculation *(8.86 times higher) was never disclosed to Smiths until forced through discovery in January 2000, after 5½ years of litigation.* Tr. 1868-71, 2011-14. Smith could not believe Price's letter and asked Mendenhall if Price was really serious about the $6,160 offer. Ex. P-85, Resp. App. 14. Mendenhall's answer was swift:

> Your understanding of the valuation and allocation of the units is *correct*. Ex. P-86, Resp. App. 15-16 (emphasis added).

It is uncontested that in the April 1994 meeting, Price's Mendenhall, upon being queried by Smith as to why Smith was the only Mall partner that had not been notified of the transfer of the Mall to the REIT, candidly stated that "due to the size and the significance of this [REIT] transaction, they [Price] *chose to ignore*" Smiths' interests. Tr. 360 (emphasis added). In late April 1994, Price finally sent to Smith a copy of the September 13, 1993 contribution agreement. Tr. 361, 513-14; Ex. P-90. Conspicuously missing was Price's high REIT computation of 20,793 REIT units as to the Mall. Tr. 1869.

**9. *The Trial, Jury Verdict and District Court Findings on Punitive Damages.*** Answering special interrogatories, the jury specifically found that Price breached its fiduciary duties, converted the Mall to itself and breached the Partnership Agreements and awarded $1.1 million compensatory damages. Pet. App. 26a-28a. The jury also determined that Price's conduct warranted punitive damages. Pet. App. 28a-29a. After further evidence

and instructions, the jury retired again and returned a punitive damage verdict of $5.5 million. Pet. App. 29a.

Subsequently, the District Court, following a state procedure established by the Supreme Court of Utah in *Crookston*, entered 5½ pages of Special Findings supporting the jury's $5.5 million punitive damage verdict, reciting specific evidence of Price's deceit, misrepresentations, breaches of fiduciary duties and conversion of the partnership assets. Price's Petition materially understates, distorts, and truncates the explicit and detailed trial court findings of Price's egregious misconduct. Pet. 12-13; but see actual Findings at Pet. App. 34a-38a.

**10.** ***Supreme Court Decision and Judgment.*** All questions raised by Price's appeal were state law issues, and, except for the state law excessiveness punitive damage issue, were reviewed by the Supreme Court of Utah under the state "abuse of discretion" standard (with facts viewed in the light most favorable to the jury's verdict). On October 3, 2003, the Supreme Court affirmed the District Court judgment in all respects with the exception of reducing the compensatory damages on the time value of money by approximately $93,000. Pet. App. 24a-25a.

As to the excessiveness of punitive damages, because Price failed to raise or brief a federal excessiveness issue on punitive damages, the Supreme Court of Utah conducted a *de novo* review of the evidence under the state law *Crookston* factors. Through ten pages of analysis, the Utah Supreme Court reviewed in detail Price's egregious misconduct, and stated:

> The fiduciary relationship of a general partner to a limited partner is one of loyalty, trust, disclosure, and confidence, calling for the utmost good faith and permitting no unfair benefits to the general partner as against the limited partner.

> We have stated in past cases that a breach of fiduciary relationship can support a large punitive damage award.

Pet. App. 22a. The Utah Supreme Court found the punitive to compensatory damage ratio of 5.5:1 to be clearly justified under the evidence:

> Having concluded our assessment of the case under the *Crookston* factors, we find that Price's intentionally deceptive business dealings with individuals to whom it owed a fiduciary duty were sufficient to support a $5.5 million punitive damage award. . . . We believe that the evidence in the record and our overall analysis support an award of this amount as a serious reprimand for Price's actions to deter future misconduct.

Pet. App. 24a.

## REASONS WHY THE CERTIORARI PETITION SHOULD BE DENIED

### I. Petitioner Failed to Raise a Federal Constitutional Question Before the Supreme Court of Utah as to Excessiveness of the Utah Punitive Damage Judgment and Now Attempts to Raise That Question Before This Court For the First Time.

The Petition should be easily denied. It is plain that Price failed to raise and brief before the Supreme Court of Utah a federal constitutional excessiveness claim under the Fourteenth Amendment as to the Utah punitive damage judgment, and attempts to raise that issue now for the first time before this Court. This Court has long held that:

> With very rare exceptions, we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless *it was either addressed by, or properly presented to, the state court that rendered the decision* we have been asked to review.

*Adams v. Robertson*, 520 U.S. 83, 86 (1997) (internal quotation and citation omitted) (emphasis added).

This Court looks to the law and appellate procedure of the state below to determine whether a federal constitutional issue was properly presented. *Wolfe v. North Carolina*, 364 U.S. 177, 194-95 (1960) ("Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy. . . .").

The Utah Rules of Appellate Procedure ("URAP") mandate that all constitutional issues be identified and spelled out in appellant's opening brief. URAP 24(a)(6) requires that *"Constitutional provisions . . . whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim* with the appropriate citation." (Emphasis added.) Resp. App. 17. In addition, URAP 24(a)(5) requires appellant to set forth in its opening brief "[a] statement of the issues presented for review . . . ." Resp. App. 18.

The record and briefing below could not be worse for Price. As to the requirement under Rule 24(a)(6), Price not only failed to raise a federal constitutional excessiveness issue in the Utah Supreme Court, ***it actually told the Utah Court that it was <u>not</u> raising a federal constitutional issue.*** Price's Opening Brief states:

**"CONSTITUTIONAL PROVISIONS AND STATUTES**

**There are no constitutional provisions or statutes whose interpretation is determinative or of central importance to this appeal."**

Price's Opening Brief at 3, Resp. App. 4 (bold added). Both the Utah Supreme Court and the Smiths were entitled to rely on this express representation by Price and they in fact did so. In its Statement of Issues raised under URAP 24(a)(5), Price simply queried "Was the jury's punitive damage award excessive?" but did not assert that the award was excessive under the federal due process clause. Resp. App. 3.

Absolutely fatal to its Petition, Price failed to brief a federal due process claim before the Utah Supreme Court. *See* URAP 24(a)(9); Resp. App. 19. Price's massive failure is witnessed by the glaring fact that at no place in its appeal to the Utah Supreme Court did it argue how the punitive damage judgment was "grossly excessive" under the three factors enunciated by *BMW v. Gore*, 517 U.S. 559, 568, 574-75 (1996) so as to "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id.* at 568. Rather, Price urged and told the Utah Supreme Court that *"[t]he factors to be analyzed by this [Utah] Court in considering whether the punitive damage award was excessive in this case" are the 7 state law standards of Crookston*. Price Br. Supr. Ct. p. 37 (emphasis added); *Crookston*, 817 P.2d at 811.

The Supreme Court of Utah has long held that its Rules of Appellate Procedure require an appellant to raise and brief an issue on appeal: "This court . . . has held in numerous cases that we will not address issues not adequately briefed." *MacKay v. Hardy*, 973 P.2d 941, 947-48

(Utah 1998). Adequate briefing "requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998).[12]

Therefore, it was no surprise that the Utah Supreme Court made an express finding in its October 3, 2003 Decision that Price had not properly raised or briefed a federal constitutional question and thus, the Court would review the excessiveness of the punitive damage award under the state *de novo* standard of review applying the state law factors of *Crookston*. Wrote the Court:

> Price did not brief the factors that the United States Supreme Court has enunciated for evaluating whether an award of punitive damages is excessive under the Due Process Clause of the U.S. Constitution. . . . Price focuses *only* on the *Crookston* factors, which were enunciated by this Court in the context of a rule 59 motion for new trial on the grounds of excessive damages. *Crookston*, 817 P.2d at 801-03. . . . *We evaluate the punitive damage award for excessiveness under the Crookston factors.*

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[12] *See also State v. Bishop*, 753 P.2d 439, 450 (Utah 1988) ("[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.") Utah appellate courts routinely and consistently decline to review issues that are not briefed. *See, e.g., Smith v. Four Corners Mental Health Center, Inc.*, 70 P.3d 904, 916 (Utah 2003); *State v. Gomez*, 63 P.3d 72, 78 (Utah 2002); *Shattuck-Owen v. Snowbird Corp.*, 16 P.3d 555, 559 n.2 (Utah 2000); *State v. Jaeger*, 973 P.2d 404, 410 (Utah 1999); *MacKay*, 973 P.2d at 949; *Thomas*, 961 P.2d at 305; *Carrier v. Pro-Tech Restoration*, 944 P.2d 346, 354-55 (Utah 1997).

Pet. App. 15a (emphasis added) (footnote omitted). The Utah Supreme Court reviewed the case *de novo* and determined under Utah law that Price's "intentionally deceptive business dealings with individuals to whom it owed a fiduciary duty were sufficient to support a $5.5 million punitive damage award." *Id.* at 24a.

Price's failure to comply with Utah appellate law, as described above, creates an independent state procedural ground barring this Court's consideration of the newly-raised federal issue. *See Webb v. Webb*, 451 U.S. 493, 498 n.4 (1981). Because Price failed to raise a federal constitutional excessiveness issue before the Utah Supreme Court, the Smiths had no opportunity to and did not brief the question. The briefs and opinion below are *devoid* of any federal constitutional analysis. Consequently, the record in this case is not properly developed for review by this Court. *See Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988).

In what is a serious misstatement, the Petition sets forth that "there can be no doubt" that Price put the Utah Supreme Court on notice of its federal constitutional due process claim, quoting from its Opening Appellate Brief "[t]he same conclusion is directed by federal law" with a passing reference to the three guideposts under *BMW v. Gore*, 517 U.S. at 574-75. Pet. 2. What Price does not tell this Court in the text of its Petition is that the quoted paragraph *turns out to be but a footnote found at page 45 of its 50-page Opening Appellate Brief, tucked away at the end of a 10-page discussion of the state law analysis* of the punitive damage award. The accurate footnote page is reproduced at Resp. App. 21. Not only does the footnote fail to cite to the Fourteenth Amendment, it totally fails to analyze or brief the *BMW* factors under the facts of Price's misconduct in this case. All that it does is simply suggest

that there is also federal law that purportedly agrees with the conclusion of Price's state law analysis. That oblique *footnote* at the end of an unrelated state law argument cannot possibly rise to the standard of a federal due process challenge as the basis upon which certiorari jurisdiction of this Court is predicated. *Adams*, 520 U.S. at 88.[13]

Lastly, but not unimportantly, Price virtually ignores Supreme Court Rule 14.1(g)(i) which emphasizes the critical importance of showing this Court that a federal constitutional question was raised and claimed both in the trial court and in the Utah Supreme Court. With the exception of Price's page 45 footnote reference, the elements of Rule 14.1(g)(i) are conspicuously missing from its Petition.

To grant the Petition herein would require this Court to ignore Price's written representations to the Supreme Court of Utah *that it was not raising a federal constitutional issue*, and reverse an express decision of the Utah Court that Price did not properly raise and brief a federal constitutional issue as required by Utah law. That is something this Court has consistently declined to do. If the

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[13] The four cases cited by Price to support its unfounded claim that it raised the federal constitutional issue are inapposite. Pet. 2-3. In three of the cited cases this Court found that the federal constitutional issue in question was raised and considered below. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 470 (2000); *Eddings v. Oklahoma*, 455 U.S. 104, 114 n.9 (1982); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 65 (1928). And unlike the Utah Supreme Court's express finding herein, none of those cases nor the fourth case, *Taylor v. Illinois*, 484 U.S. 400 (1988), indicate an express holding by the state court that the petitioner had failed to properly raise and brief the constitutional issue in accordance with state law.

Petition were granted, 28 U.S.C. § 1257(a) and Supreme Court Rule 14.1(g)(i) would cease to have meaning.

## II. Even if Price Had Raised and Briefed a Federal Issue Below (Which It Plainly Did Not), The Petition Should be Denied Because the Utah Supreme Court, Like This Court, Has Not Established a Bright-Line Formula to Review a State Punitive Damage Judgment.

The thrust of Price's argument should not be lost on this Court. It asks this Court to grant certiorari to review a second decision in nine months of the Utah Supreme Court, the first being *State Farm Auto Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003), to hold that this Court did not mean what it said in *State Farm*. Price requests that the Court fix a due process mathematical formula of a 1:1 ratio of punitive to compensatory damages where compensatory damages are "substantial." Pet. 22.[14] Price does not define the meaning of "substantial," but finds something magical about the sum of "$200,000 or higher." Pet. 4, 18, 19.

This Court has refused to apply strict mathematical formulas in punitive damage cases because that would ignore the gravity and egregiousness of the misconduct and the individual facts of each case. *BMW v. Gore*, 517 U.S. at 582. In *State Farm*, the Court reemphasized its rejection of mathematical formulas. *Id.* at 1524. Although the Court stated that "few awards exceeding a single-digit ratio . . . *to a significant degree*, will satisfy due process,"

[14] Although confusing, Price sometimes suggests that a fixed ratio of slightly less than 5.5:1 would be acceptable to it. *See, e.g.*, Pet. 14-15.

the "precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* (emphasis added).[15]

The Supreme Court of Utah fully concurs with this Court that review of a punitive damage judgment is not to be governed by a bright-line or fixed-formula ratio. In the instant case, the Utah Supreme Court again rejected fixed bright-line ratios under Utah law, while recognizing that "the amount of a punitive damage award must bear a reasonable and rational relationship to the actual damages." Pet. App. 23a. In *Crookston*, the Utah Supreme Court explained why bright-line formulas undermine legal policy:

> [T]he absolute ceiling approach is too mechanical and could potentially defeat the very purpose of punitive damages. . . . For example, strict dollar amount, percentage of the defendant's wealth, and ratio ceilings, all would allow potential defendants to calculate their exposure to liability in advance, thus diminishing the deterrent effect of punitive damages.

*Crookston*, 817 P.2d at 809 (internal citations omitted). As both this Court and the Utah Court have noted, the justification of a punitive award depends substantially upon the

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[15] This Court has consistently rejected strict constitutional formulas. As Mr. Justice Holmes wrote in *Gompers v. U.S.*, 233 U.S. 604 (1914):

> "[P]rovisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil."

*Id.* at 610.

egregiousness and "reprehensibility" of the defendant's misconduct. Pet. App. 24a; *BMW*, 517 U.S. at 575-76.

Price's misconduct as a fiduciary to the Smiths was outrageous and highly reprehensible. Price intentionally engaged in deceit, fraud and conversion of Smiths' 15% partnership interests in a major shopping Mall, cooked the partnership books, rendered a bogus accounting, offered but $6,160 for the Smiths' interest in the Mall (found by the Utah Court to have a fair market value of over $1 million) and committed numerous other reprehensible acts. Price profited in the tens upon tens of millions from its fiduciary breach and conversion by secretly conveying the Mall into the JP Realty REIT which stock was sold on the New York Stock Exchange. Price's wanton and reckless misconduct was also demonstrated by the testimony of John Price, who as the CEO/owner of a fiduciary, repeatedly implied that he had little concern about the Smiths' Mall interests and reluctantly admitted that in March 1994, he authorized Price to offer the **$6,160** for Smiths' entire partnership interests. Tr. 587-613. Price's misconduct could easily warrant a ratio substantially higher than the 5.5:1 ratio determined by the Utah Supreme Court.

Yet, Price's Petition asks this Court to forget it failed to raise a federal constitutional issue and to carve out a departure from *State Farm* by fixing a straight-jacket formula 1:1 ratio of punitive to compensatory damages. Price then proceeds to give the Court, without analytical basis, its own 10-month report card on 23 post-*State Farm* punitive damage decisions throughout the country to argue that proper tribute is not being given to *State Farm* and that another decision of this Court is needed using a

1:1 ratio as virtually the only dispositive criteria. Pet. 4, 15, 16, 18, 19-22.[16]

The report card is of no value and the cases cited are inapposite and readily distinguishable. First, a federal constitutional due process question was plainly raised in the 23 cited cases, whereas, in the instant case, Price failed to raise a federal constitutional challenge and the Utah Court therefore reviewed *de novo* the punitive damage judgment under state law standards.

Second, there is no analysis, whatsoever, in Price's cited cases as to the gravity and reprehensibility of the defendants' misconduct, or of any of the highly relevant factors other than mathematical ratios in a federal excessiveness review. Thus, Price's case citations are meaningless.

Because Price's Petition rests fundamentally on the quest for a fixed mathematical formula of 1:1, the *actual* ratios of cases recently decided to be "grossly excessive" under the Fourteenth Amendment by this Court demonstrate the folly of Price's argument. In *BMW*, the ratio was ***500:1*** and was predicated upon BMW's conduct outside the borders of Alabama. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 426 (2001), the ratio was ***90:1***. In *State Farm*, the ratio was ***145:1*** for conduct that principally had little to do with Campbell's injuries and largely involved State Farm's conduct nationwide. *Contrast those high ratios to the **5.5:1** ratio in the instant case where all punitive damages awarded directly related*

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[16] Price's cited cases include *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 661 N.W.2d 789 (Wis. 2003) which involved a 7:1 ratio. This Court denied certiorari in *Trinity* on December 8, 2003, No. 03-502.

*to Price's egregious misconduct against the Smiths within the state of Utah.* Notably, Price fails to even mention in its Petition the direct nexus of punitive damages to the Smiths or that Price was punished for conduct inside Utah's borders.

The bright-line mathematical formula sought by Price would not only undo and reverse the single digit rationale of *State Farm*, it would set a fixed formula ratio of 1:1 which would be warmly embraced by those of Price's animus and views of the business world. A fixed formula would be used by fiduciaries and others like Price in a pre-event cost-benefit risk analysis to handicap the odds and the effect of being caught in deceitful and fraudulent business conduct. *Crookston*, 817 P.2d at 809. Price's bright-line fixed-formula ratios under its Petition should be rejected.

## III. Even if Price Had Raised and Briefed a Federal Constitutional Issue Below (Which It Clearly Did Not), the Petition Should Be Denied Because the Utah Supreme Court Conducted a Full *De Novo* Review of the Punitive Damage Judgment Under Utah Law.

The Utah Supreme Court stated that because Price failed to brief a federal constitutional issue, it would evaluate the punitive damage award under the *Crookston* state law factors. The Utah Court reiterated that it had "adopted a de novo standard for reviewing jury and trial court conclusions under the *Crookston* factors." Pet. App. 15a-16a (citation and footnote omitted). Those seven factors are: (1) The Relative Wealth of Price; (2) The Nature of Price's Misconduct; (3) Facts and Circumstances Surrounding Price's Misconduct; (4) Effect of Price's Misconduct on the Smiths and Others; (5) Probability of Future Recurrences; (6) Relationship of the Parties; and

(7) Ratio of Punitive to Compensatory Damages. Pet. App. 17a-23a; *Crookston*, 817 P.2d at 800.

The Utah Court then conducted a lengthy *de novo* analysis of the facts under each *Crookston* factor. Pet. App. 17a-24a. The Court opinion leaves no doubt that every *Crookston* factor was carefully reviewed *de novo*, whereupon the Court held that Price's fraud, deceit, and wanton disregard of the Smiths' partnership rights warranted the punitive award. Price is obviously unhappy with the outcome of the Utah *de novo* review, and it now asks this Court to instruct the Utah Supreme Court as to "how" to perform *de novo* review under Utah procedure and case law. Pet. 22. The Utah Court, however, needs no such tutoring.

Contrary to the plain dictates of the decision, Price claims that the Utah Supreme Court *de novo* review consisted of "doubly differential" approval of the District Court and jury verdict findings. Pet. 4, 23, 28. Price then proceeds to cherry pick selective out-of-context sentences from the Utah Court decision. Pet. 4, 13, 23. Price ignores that the Utah Supreme Court decision is replete with specific fact findings concerning Price's misconduct.[17] Pet. App. 14a-24a.

The Utah Court did *not* defer to the District Court's specific findings; instead, the Court made its own independent fact analysis, noted such District Court findings and ultimately agreed with them:

> *We agree with the trial court* that Price's actions amount to affirmative misconduct showing deliberate misrepresentation and disregard of

[17] Price engages in the same selective cherry picking in the four cases it cites in its "deferential" *de novo* argument. Pet. 23-24.

> the rights of the Smiths. Price's actions accordingly support a substantial award of punitive damages. Pet. App. 19a (emphasis added).

The Utah Court will not be faulted for stating certain findings and then after its own *de novo* review, concurring with them.

Further, Price wrongfully lifts out of context a quotation from the Utah Supreme Court opinion to support its misplaced argument that the Court opinion applied a deferential standard of review, quoting language to the effect that "[r]easonable minds could differ" as to whether Smiths were damaged by Price's wrongful conduct. Pet. 28 n. 10. Price does not disclose that the quoted language is **not**, however, from the section of the Utah Court's opinion dealing with excessiveness, **but is taken from the Utah Court's analysis affirming the trial court's denial of Price's motion for directed verdict** which is admittedly reviewed on appeal under "an abuse of discretion" standard. Pet. App. 7a; Resp. App. 3; *Mahmood v. Ross*, 990 P.2d 933, 937 (Utah 1999).

After Price mistakenly claims that the Utah Court did not conduct a *de novo* review, Price then conducts its own *de novo* review. Shorn of its obfuscating fleece, Price's analysis is a regurgitation of purported facts that were not credible, believed or determined by the jury, the District Court or the Utah Supreme Court.

Finally, Price claims that this Court needs to again "clarify" that under federal constitutional law an excessiveness analysis is conducted *de novo*. Pet. 30. This Court does not need to "clarify" anything. It has already articulated the rule on federal *de novo* review of punitive damage judgments. *Cooper Industries*, 523 U.S. at 436; *State Farm*, 123 S. Ct. at 1520; and *Norton v. Matthews*, 427 U.S. 524, 530-31 (1976) (no substantial jurisdictional question

is presented where a question has been settled by previous decisions of the Supreme Court). It is axiomatic that federal and state courts understand that *de novo* review means a new review of the facts.

## CONCLUSION

The Petition should be denied.

Respectfully submitted,

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## APPENDIX

**Page No.**


1. Opening Appellate Brief of Price Development to the Utah Supreme Court, cover, p. 1-3 (4 pages) ..... App. 1
2. Rule 58B Partial Satisfaction of Judgment (3 pages) ..... App. 5
3. North Plains Mall Development Company Limited Partnership Agreement, p. 24, Art. 19 (1 page) ..... App. 9
4. Letter dated March 8, 1994 from Price's Mendenhall to Armand Smith with "Revised REIT Value Calculation" of $6,160 (3 pages).. App. 10
5. Letter dated March 16, 1994 from Smith to Price's Mendenhall on $6,160 offer ..... App. 14
6. Letter dated March 17, 1994 from Price's Mendenhall to Smith on $6,160 offer ..... App. 15
7. Utah Rule of Appellate Procedure 24(a)(6) ..... App. 17
8. Utah Rule of Appellate Procedure 24(a)(5) ..... App. 18
9. Utah Rule of Appellate Procedure 24(a)(9) ..... App. 19
10. Opening Appellate Brief of Price Development to the Utah Supreme Court, p. 45, fn 39..... App. 20

IN THE UTAH SUPREME COURT

ARMAND L. SMITH,
Individually and as Trustee for
the Armand L. Smith, Jr. Trust
and the Shannon S. Windham
Trust, and VIRGINIA L. SMITH,

Plaintiffs/Appellees,

vs. Case No. 20010673-SC

FAIRFAX REALTY, INC.,
formerly PRICE DEVELOPMENT
COMPANY, a Utah corporation,
NORTH PLAINS LAND
COMPANY, LTD., a Utah limited
partnership, and NORTH PLAINS
DEVELOPMENT COMPANY,
LTD., a Utah limited partnership,

Defendants/Appellants.

# BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT,
HONORABLE FRANK G. NOEL PRESIDING,
SALT LAKE CITY, STATE OF UTAH

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## STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(e)(j) (1996).

## STATEMENT OF ISSUES

I. As a matter of law and undisputed fact, did the plaintiffs (the "Smiths") suffer any damages that were caused by the alleged breaches of contract and breaches of fiduciary duty on the part of the defendants ("Fairfax") where Fairfax took the only alternative available to save the property at issue in this case from a total loss – contributing the property to a real estate investment trust ("REIT")?[1]

[1] Issue preserved at R 1736-39 (summary judgment motion); 4538 at 4-9, 55-56 (oral argument and ruling); 3202-03 (ruling); 1706-08, 3116-19 (motion in limine re: REIT damages); 1922-2009, 3129-32 (motion in limine re: Howden); 2013-19, 3120-28 (motion in limine re: Norman); 4538 at 56 (oral argument); 3201-04 (ruling); 4545 at 1002-08

(Continued on following page)

*Standard of Review*: In reviewing the Trial Court's denial of a motion for a directed verdict, this Court reviews "the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to [the Smiths], and will sustain the denial if reasonable minds could disagree with the ground asserted for directing a verdict." *Mahmood v. Ross*, 1999 UT 104, ¶ 16, 990 P.2d 933.

II. Did the Trial Court err in submitting the issue of punitive damages to the jury in the absence of evidence that Fairfax willfully and deliberately disregarded the rights of the Smiths in a way that proximately caused injury?[2]

*Standard of Review*: A trial court's determination of whether sufficient evidence has been shown to submit a claim of punitive damages to a jury is a question of law, reviewed by courts de novo. *See Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 995 (10th Cir. 1999).

III. Was the jury's punitive damage award excessive?[3]

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(directed verdict motion); 4545 at 1014 (ruling); 4551 at 2034 (directed verdict motion); 4551 at 2035 (ruling); 4551 at 2132 (instruction objections); 3754-63, 3782-88, 4265-80 (j.n.o.v. motion); 4508 (ruling).

[2] Issue preserved at R 4545 at 1002-05 (directed verdict motion); 4545 at 1014 (ruling); 4541 at 2034 (directed verdict motion); 4541 at 2035 (ruling); 4551 at 2133, 2139 (instruction objections); 3754-67, 3782-88, 4265-80 (j.n.o.v. motion); 4508 (ruling).

[3] Issue preserved at R 3738-3811, 4157-262 (motion for new trial or remittitur); 4553 at 3-27, 55-58 (oral argument); 4509-10 (ruling);

(Continued on following page)

*Standard of Review*: The Trial Court's decision in this regard is reviewed for correctness and is given no deference. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, ¶13, 15, 432 Utah Adv. Rep. 44.

IV. Did the Trial Court err in submitting the issue of prejudgment interest to the jury and in entering a judgment including prejudgment interest; alternatively, was the evidence sufficient to support the amount of the jury's award of prejudgment interest?[4]

*Standard of Review*: Entitlement to prejudgment interest is a question of law reviewed for correctness. *Lyon v. Burton*, 2000 UT 19, ¶73, 5 P.3d 616. Evidence is insufficient to support a verdict "if, taking the evidence in the light most favorable to the prevailing party, the appellant demonstrates that the findings lack substantial evidentiary support." *Water & Energy Sys. Tech., Inc. v. Keil*, 2002 UT 32, ¶15, 48 P.3d 888.

## CONSTITUTIONAL PROVISIONS AND STATUTES

There are no constitutional provisions or statutes whose interpretation is determinative or of central importance to this appeal.

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4352-4407, 4469-75 (special finding objections); 4510 (ruling); 4493-98 (special findings).

[4] Issue preserved at R 1709-15, 3207-24 (motion in limine); 4538 at 61-65, 68 (oral argument); 3511-12 (ruling); 4539 at 92-99 (trial argument and ruling); 4551 at 2132, 2137, 2139 (instruction objections); 3720 (Instruction No. 44); 3799-3801, 4168-69 (motion for new trial or remittitur); 4553 at 28 (argument); 4509-10 (ruling).

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**IN THE THIRD JUDICIAL DISTRICT COURT**

**IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

| | |
|---|---|
| **ARMAND L. SMITH, Individually and as Trustee for the Armand L. Smith, Jr. Trust and the Shannon S. Windham Trust, and VIRGINIA L. SMITH,** | |
| **Plaintiffs,** | **RULE 58 B PARTIAL** |
| **v.** | **SATISFACTION OF JUDGMENT** |
| **PRICE DEVELOPMENT COMPANY, a Utah corporation, n/k/a FAIRFAX REALTY, INC., NORTH PLAINS LAND COMPANY, LTD., a Utah limited partnership, and NORTH PLAINS DEVELOPMENT COMPANY, LTD., a Utah limited partnership,** | Civil No. 940904312 CV<br>Honorable Frank G. Noel<br>Presiding District Court Judge |
| **Defendants.** | |

The Plaintiffs Armand L. Smith, individually and as Trustee for the Armand L. Smith, Jr. Trust and the Shannon S. Windham Trust, and Virginia L. Smith ("Smiths"), by and through their counsel of record, Robert S. Campbell, pursuant to Utah Rule of Civil Procedure 58B, hereby acknowledge receipt of the following sum in part satisfaction of the Judgment on Special Verdicts of the Jury for Compensatory & Punitive Damages (the "Judgment"), entered by this Court on June 29, 2001, against the Defendants, Price Development Company n/k/a Fairfax Realty, Inc.:

| **DATE RECEIVED** | **AMOUNT RECEIVED** |
|---|---|
| **December 23, 2003** | **$1,199,568.10** |

The "Amount Received" listed above consists of the compensatory damages set out in paragraph I and costs under paragraph IV.d. of the Judgment as:

| | |
|---|---|
| Compensatory Damages pursuant to ¶ 1 of the Judgment, (Including time value or "interest" as modified by the Utah Supreme Court)..... | $1,007,221.00 |
| Costs under paragraph IV.d. of the Judgment..... | $7,133.26 |
| Subtotal | $1,014,354.26 |
| Post-judgment interest on Subtotal amount at 7.34% p/annum ..... | $185,213.84 |
| (From June 29, 2001 through December 23, 2003) | |
| Amount Received herein under Part Payment of Judgment ..... | **$1,199,568.10** |

Except for this part payment and Satisfaction of a part of the Judgment of this Court as identified and set out herein, as affirmed and modified by the Utah Supreme Court to include appellate attorneys fees and costs which have yet to be specifically determined, the balance of said judgment remains unpaid and in full force and effect.

DATED this 23 day of December, 2003.

Respectfully submitted,

/s/ Robert S. Campbell
ROBERT S. CAMPBELL
JENNIFER K. ANDERSON-WHITLOCK
of and for
VAN COTT BAGLEY CORNWALL & MCCARTHY
*Attorneys for Plaintiffs Armand L. Smith and Virginia L. Smith, et al.*

## ARTICLE 19

## ATTORNEYS' FEES AND COSTS

In the event of any legal proceeding involving the interpretation or enforcement of the rights or obligations of the Partners hereunder, the prevailing party or parties shall be entitled to recover its reasonable attorneys' fees and costs.

North Plains Land Company Agreement of Limited Partnership, p. 23, Art. 19 (P. Ex. 15); and North Plains Development Company Agreement of Limited Partnership, p. 24, Art. 19 (P. Ex. 16).

**(LOGO) PRICE DEVELOPMENT COMPANY,**
LIMITED PARTNERSHIP
35 CENTURY PARK-WAY –
SALT LAKE CITY, UTAH 84115
TELEPHONE (801) 486-3911
TELECOPIER FAX (801) 486-7853

March 8, 1994

Via Facsimile
Original by Regular Mail

Armand L. Smith
P.O. Box 159
Clovis, New Mexico 88101

Re: North Plains Mall

Dear Armand:

Pursuant to our conversation of Thursday February 24 you will find enclosed the following documents:

1. A copy of the original computation of estimated value showing the allocation of 8,793 units in the new operating partnership to North Plains Mall. Your allocation of units is based on your 15% ownership interest (8,793 units x 15% = 1,319 units), and the issuance of units for the principal portion of your partner loan ($230,640/$17.50 per unit = 13,179 units). The combined total units allocated to you would be 14,498 units. The value of the units is initial offering price of the REIT stock. Subsequent to the offering the value of the units will be equivalent to the value of the publicly traded shares.

2. A copy of the revised computation of estimated value schedule with the full accrual of interest on the partner loans. Based on the computation the

partnership would be allocated 2,348 units in the operating partnership. The allocation of units based on your ownership of 15% would be 352 units.

3. A copy of the balance sheets and a source and application of the due to managing general partner account for the period from December 31, 1988 through December 31, 1992; and

4. A copy of the same information starting October 31, 1989, showing the activity for the two months ending December 31, 1989. This schedule shows the change in the intercompany account for the general partner from the time of the capital call which was never picked up with the final settlement.

Based on our discussion, we would pay you the principal amount of your partner loan in the amount of $230,640 plus allocate to you 352 units in the operating partnership. The allocation of the units should make the transaction non-taxable. You should, however, consult with your tax advisor relative to any negative basis gains and the handling of your own personal tax considerations. If you have specific tax questions regarding the transaction, please call me and I will put you in touch with our tax advisor on this transaction.

Please review the enclosed items. If you have questions, please call.

Sincerely,

/s/ Paul K. Mendenhall
Paul K. Mendenhall

cc: John Price
Warren P. King
G. Rex Frazier
Martin G. Peterson

NORTH PLAINS MALL
COMPUTATION OF ESTIMATED VALUE
JANUARY 12, 1994

| | | |
|---|---|---|
| A. | Net Operating Income For The Partnership | 1,209,300 |
| B. | Less Interest For Debt If Not Paid Off | (319,200) |
| C. | Less New Expense Related To Public REIT (510,000 Divided By 33,000,000 = (.01545) Times A) | |
| D. | Funds From Operations | 890,100 |
| E. | Reserve For Capital Expenditures And Working Capital (6.9%) | 94.00% |
| | Payout Percentage | |
| F. | Funds Available For Distribution | 836,694 |
| G. | Capitalization Rate | 9.00% |
| H. | Gross Value Before Debt Repayment, Prepayment Penalties, And Offering Expenses | 9,296,600 |
| I. | Less Debt Repayment | (11,246,906) |
| J. | Less Accrued Interest On Debt | (72,500) |
| K. | Less Prepayment Penalties On Debt | |
| L. | Less Intercompany Loan Payment | (1,680,916) |
| M. | Plus New Debt Allocation | 4,800,000 |

| | | |
|---|---|---|
| N. | Less New Expenses On New Debt (3,968,000 Divided 95,000,000 = (.0417) Times M) | (206,400) |
| O. | Less Public Offering Expenses (2,600,000) Divided By 262,500,000 = (.009905) Times H | (92,083) |
| P. | Less Underwriting Costs And Expenses To Raise Capital To Pay Existing Debt (16,200,000 Divided By 174,000,000 = (.09310) Times I Plus L Plum [Sic] M) | (756,700) |
| Q. | Estimated Net Value Of The Partnership | 41,095 |
| R. | Estimated Initial Dividend (G Times Q) | 3,699 |
| S. | Estimated Total Partnership Units (D Divided By $17.50 Per Share) | 2,348 |

ARMAND L. SMITH
P.O. BOX 159
CLOVIS, NEW MEXICO 88101

March 16, 1994

Mr. Paul Mendenhall
Price Development Company,
Limited Partnership
35 Century Parkway
Salt Lake City, UT 84115

Dear Paul:

This is relative to your March 8th letter which I received March 14th, concerning the North Plains Mall.

As I understand your offer it is:

1. Repayment of partnership loan in the amount of $230,640, in cash. This would be the total amount without any interest.

2. Value of 15% equity in project for 352 units in operating partnership at a value of $17.50 per unit or a total of $6,160.

Is my understanding of your offer correct?

Sincerely,

/s/ Armand Smith
Armand Smith

ALS/dd

[LOGO] PRICE DEVELOPMENT COMPANY,
LIMITED PARTNERSHIP
35 CENTURY PARK-WAY •
SALT LAKE CITY, UTAH 84115

TELEPHONE (801) 486-3911
TELECOPIER-FAX (801) 486-7653

March 17, 1994

Via Facsimile
Original by Mail

Armand L. Smith
P.O. Box 159
Clovis, New Mexico 88101

Re: North Plains Mall – Clovis, New Mexico

Dear Armand:

I have received the facsimile copies of your letters of March 14 and March 16, 1994. In response to your questions:

1. F. Charles Huber is our tax advisor on the transaction. He can be reached in care of Huber, Erickson and Bowman; 175 East 400 South; Salt Lake City, Utah 84111. His telephone number is (801) 328-5000. If there are any questions Chuck is unable to address, I can have you talk directly to the tax partner at Rogers & Well in New York.

2. With respect to interest on the loans from the partners, interest has been accrued on those loans but no interest has been paid.

3. Your understanding of the valuation and allocation of the units is correct.

If I can answer any further questions for you, please call.

Sincerely,
/s/ Paul K. Mendenhall
Paul K. Mendenhall

cc: G. Rex Frazier

## UTAH RULE OF APPELLATE PROCEDURE 24(a)(6)

The brief of the appellant shall contain under appropriate headings and in the order indicated:

. . .

Constitutional provisions statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

## UTAH RULE OF APPELLATE PROCEDURE 24(a)(5)

The brief of the appellant shall contain under appropriate headings and in the order indicated:

. . .

A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority . . .

## UTAH RULE OF APPELLATE PROCEDURE 24(a)(9)

The brief of the appellant shall contain under appropriate headings and in the order indicated:

. . .

The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.

IN THE UTAH SUPREME COURT

ARMAND L. SMITH Individually and as Trustee for the Armand L. Smith Jr, Trust and the Shannon S. Windham Trust, and VIRGINIA L. SMITH

Plaintiffs/Appellees,

vs. Case No. 20010673-SC

FAIRFAX REALTY, INC., formerly PRICE DEVELOPMENT COMPANY, a Utah corporation NORTH PLAINS LAND COMPANY, LTD., a Utah limited partnership, and NORTH PLAINS DEVELOPMENT COMPANY, LTD., a Utah limited partnership,

Defendants/Appellants,

# BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, HONORABLE FRANK G. NOEL PRESIDING, SALT LAKE CITY, STATE OF UTAH

Robert S. Campbell, Jr. (0557)
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Brent D. Wride (5163)
Rick B. Hoggard (5088)
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P.O. Box 45385
Salt Lake City, Utah 84145-0385

Attorneys for Appellants

claim, this Court should reduce the punitive damages significantly below the 3:1 guideline or, alternatively, grant a new trial.[39]

## IV. The Trial Court Erred By Disregarding Controlling Utah Law Precluding Prejudgment Interest on an Unliquidated Claim and by Concluding That There Was Evidence Sufficient to Support the Amount of the Jury's Award of Prejudgment Interest.

Over Fairfax's objection, the Smiths presented evidence of, and the jury awarded, $690,000 in prejudgment interest on breach-of-fiduciary-duty damages, which were based on or derived from the fair market, appraised pre-REIT value of the Partnerships. (P-173; R 4388.) The Trial Court committed three errors with respect to prejudgment interest: first, the Trial Court erred in submitting the issue to the jury; second, the Trial Court erred by permitting interest on any damages derived from an estimate of the fair market value of the Partnerships; and third, the Trial Court erred in denying Fairfax's motion for a new trial or remittitur based on the jury's excessive award.

### A. The Trial Court Erred In Submitting the Issue of Prejudgment Interest to the Jury.

It is well settled that the "decision to grant or deny prejudgment interest presents a question of law." Cornia v. Wilcox, 898 P.2d 1379, 1387 (Utah 1995). As such, the trial court erred in submitting the issue of prejudgment interest to the jury. As discussed above,

[39] The same conclusion is directed by federal law. Under the three guideposts for federal due process analysis – "'[1] the degree of reprehensibility of the [conduct]; [2] the disparity between the harm suffered . . . and [the] punitive damages award; and [3] the difference between this remedy [the punitive damage award] and the . . . penalties authorized or imposed in comparable cases,'" Campbell, 2001 UT 89, ¶39 (citing BMW, 517 U.S. at 574-75 (1996) – the award here is excessive and requires reversal or significant reduction.